IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-151

HARRY T. MANGURIAN, JR. and DOROTHY MANGURIAN, his wife, and DREXEL PROPERTIES, INC., a Florida corporation, *Petitioners*,

v.

CLAYTON P. THOMPSON, WILLIAM M. WYANT, and VIRGINIA WYANT, his wife, individually and on behalf of all others similarly situated, *Respondents*.

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIAN C. DEUSCHLE
DONALD C. HAIN
5554 North Federal Highway
Fort Lauderdale, Florida 33308

*Attorneys for Petitioners*

*Of Counsel:*
SPEAR, DEUSCHLE & CURRAN, P.A.

## INDEX



## CITATIONS

CASES:

CASES (continued):



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-151

---

HARRY T. MANGURIAN, JR. and DOROTHY MANGURIAN, his wife, and DREXEL PROPERTIES, INC., a Florida corporation, *Petitioners*,

v.

CLAYTON P. THOMPSON, WILLIAM M. WYANT, and VIRGINIA WYANT, his wife, individually and on behalf of all others similarly situated, *Respondents*.

---

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioners file this brief, limited to arguments first raised in the brief in opposition to their petition for a writ of certiorari, pursuant to Rule 24(4) of the Rules of this Court.

## I. CONTRARY TO THEIR ASSERTION, RESPONDENTS HAVE NOT MADE A PRIMA FACIE CASE SHOWING A CONTINUING VIOLATION.

Respondents, contrary to their assertion in their Brief in Opposition (at page 3), have not pled and made a prima facie case showing a continuing violation of the Federal Antitrust Laws. True, Respondents allege a continuing conspiracy in restraint of trade (Paragraph 15 of Complaint), but in support of such conclusitory assertion only allege the enforcement of the Lease. Petitioners contend that, contrary to the holding of the Court of Appeals in the instant case, the mere enforcement of a legal lease, without more, is not a continuing violation giving rise to new causes of action which start the Statute of Limitations running anew.

Petitioners, of course, recognize that a lease may be the means of a continuing violation of the Sherman Act if the lease is used as an instrument for the exercise and maintenance of monopoly power, as were the leases in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). However, there was no assertion in the instant case that Petitioners, either alone or with others, were in any way attempting to monopolize the recreational market — nor could there be.

The failure of Respondents to make a prima facie case showing a continuing violation by Petitioners is fatal to their arguments which are based upon such an assumption.

## II. THE ATTEMPT BY RESPONDENTS TO RECONCILE THE DECISIONS OF THE VARIOUS CIRCUITS IS NOT SUPPORTED BY THE FACTS REPORTED IN THE OPINIONS IN SUCH CASES.

In *Akron Presform Mold Company* v. *McNeil Corporation*, 496 F.2d 230 (6th Cir. 1974), plaintiff had asserted a continuing violation, i.e., enforcing an injunction (at page 232). The court in that case, however, did not consider this as an "overt act" which would start the Statute of Limitations running anew. The case is therefore entirely consistent with previous holdings of the Sixth Circuit on the matter here at issue and in conflict with the holding of the Fifth Circuit in the instant case.



Likewise, *Hoopes* v. *Union Oil Co. of Califonia*, 374 F.2d 480 (9th Cir. 1967), does not demonstrate, as urged by Respondents, that the Ninth Circuit had overruled its former decision in *Steiner v. 20th Century-Fox Film Corporation*, 232 F.2d 190 (9th Cir. 1956). In fact, the Ninth Circuit cited *Steiner* in *Hoopes* as an authority for its holding (at page 486). As noted under Point I of this Brief, the enforcement of a lease is not a continuing violation of the Sherman Act unless the lease is used as an instrument for the maintenance of monopoly power. The "lease-leaseback" agreement in the *Hoopes* case was alleged to be one of numerous similar such agreements used as a means to foreclose competition in the gasoline products market in violation of the antitrust laws (at page 484). If a lease or other contractual agreement is so used, enforcement of such lease or agreement is, as shown by the *Hanover Shoe* case, *supra*, a continuing violation.

Respondents' contention that *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), also showed an overruling of the Ninth Circuit's decision in the *Steiner* case is based, as was the Fifth Circuit's statement of the case, upon an inaccurate and misleading analysis of the case.

In its opinion, the Fifth Circuit cites the fact that Finley alleged, among other things, that the 1950 contract constituted a per se violation of Section 1 of the Sherman Act because it unlawfully tied the purchase of concession services to the extension of credit. It goes on to state that Sportservice pleaded the Statute of

Limitations and that the Ninth Circuit rejected the argument on the basis of footnote 15 in the *Hanover Shoe* case, *supra*, which it quotes (at page 1270). The Ninth Circuit did no such thing. It rejected this allegation and all the other allegations of violations of the Sherman Act on the grounds that the district court had erred in deciding what was the applicable market involved in the case. It determined that the relevant market was not the concession products market, as the district court had found, but rather the franchise market. Accordingly, practically the entire opinion deals with the effect of this conclusion on the various violations of the Sherman Act alleged by the plaintiff. In discussing the alleged illegal tying agreement, the court stated: "Our decision to reverse and remand the judgment of the trial court for the purpose of fixing the relevant franchise market makes it necessary that we consider the trial court's conclusion that Sportservice is guilty of a *per se* violation of Sec. 1 of the Sherman Act..." at page 1275). It then discussed the alleged tying agreement in the light of the relevant market, i.e., the franchise market, and concluded that "(t)he seller-borrower's monopoly power may induce such a loan; but that does not warrant the transformation of the purchaser-lender into a seller of two commodities, cash payments and a favorable loan, for the purpose of charging such purchaser-lender with Sherman Act violations." (at page 1276) Since the Ninth Circuit determined that there was no illegal tying agreement, its initial discussion of whether Finley's antitrust claims were barred by limitations does not pertain to that particular violation. The court's discussion of the Statute of Limitations was, therefore, limited to the other alleged violations and concluded that, if the facts in the case sustained such allegations, the statute would be tolled on the grounds that "(t)o hold otherwise is to say that some damage that might have been sustained was barred before it accrued." (at page 1270)



As regards Respondents' contention that the Second Circuit decisions were merely those of the district court in that circuit, Petitioners point to the fact that, while they found no *opinions* discussing the point at the Court of Appeals level, at least one recent decision of a district court had been upheld by the Court of Appeals for the Second Circuit, *Korn* v. *Merrill*, 403 F. Supp. 377 (S.D.N.Y. 1975), *aff'd* 538 F.2d 310 (2nd Cir. 1976), and thus became the *decision* of the Court of Appeals. Respondents appear to be confusing "opinions" with "decisions". Furthermore, the numerous decisions of the district courts in the Second Circuit are all in opposition to those of the Fifth Circuit in the present case.

*Baker* v. *F & F Investment*, 420 F.2d 1191 (7th Cir. 1970), referred to by Respondents and relied upon by the Court of Appeals for the Fifth Circuit, is concededly in conflict with the decisions of the Second, Sixth and Ninth Circuits. However, insofar as the court purported to include within its opinion a decision on the Statute of Limitations with respect to a violation of Section 1 of the Sherman Act, the court, in *Baker*, was in error.

The complaint in the *Baker* case involved a violation of the Federal Civil Rights Act, although violations of the Federal and State antitrust acts were also alleged. The plaintiffs, who were black, alleged that the defendants had conspired to sell them homes at higher prices and by means of installment sales contracts containing more onerous contractual terms than were exacted from white buyers. The plaintiffs alleged that this constituted a conspiracy to fix prices in violation of the Federal Civil Rights Act and the Federal and State antitrust acts. The Court of Appeals, in its opinion, stated that the plaintiffs "have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. That relationship, by the same token, constituted a prolonged and continuing violation of the

rights of purchasers." (at page 1200) The Court of Appeals then concluded that, because of the continuing nature of the overt acts alleged (the collection of installment payments), the Statute of Limitations did not commence to run when the contracts were executed, but when they were terminated.

As authority for this conclusion, the Seventh Circuit first relied (at page 1200) on its own opinion in the *Zenith* case[1] where the court had held that the limitations period commenced to run from the last overt act of the conspiracy, permitting plaintiffs to recover "for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-(limitation) period acts occurring in the damage period."[2] It should be noted, however, that the Seventh Circuit's statement in the *Zenith* case was made in the context of a continuing conspiracy by defendants to monopolize a foreign market by excluding plaintiff from its patent pool arrangement in such market. The refusal to deal with the plaintiff in that case was the original "overt" act, and since plaintiff did not show any further act of refusal, the Statute of Limitations accrued from the date of the first refusal to deal. This Court, on certiorari, 401 U.S. 321 (1971), agreed with the Seventh Circuit's analysis of the last overt act, but held that if, during the limitations period, the damages flowing from such act were too speculative to be ascertained, then the statute was tolled until such damages could be ascertained. (Note, however, that this was a tolling of the statute, not a change of the definition of overt act.) In the *Baker* case, the alleged antitrust violation was price fixing. For such an allegation to constitute a violation of Section 1 of the Sherman Act, it is necessary to first demonstrate monopoly power. As stated in the *Twin City* case, *supra*, (at page 1270) "(m)onopoly power is the power to control prices or exclude competition." See also cases cited therein. There is no allegation in the *Baker* case that the defendants had monopoly power in the housing market for blacks in Chicago. Without such power, there could be no price fixing violation under Section 1 of the Sherman Act.

[1]418 F.2d 21 (7th Cir. 1969)

[2]*Id.* at 25



The Seventh Circuit then went on to cite the *Hanover Shoe* case as authority for its conclusion that "(b)ecause of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate." (at page 1200) The overt acts were the collection of installment payments under the contract. However, as noted previously, this Court in the *Hanover Shoe* case found that the leases themselves were violations of the antitrust act because they maintained a monopoly. On that basis, this Court determined that the collection of rent under such leases was "conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover." (at page 502, n.15) Since there was no allegation of monopoly power in the *Baker* case, the principle of "continuing violation" enunciated in the *Hanover Shoe* case is not applicable to the facts in the *Baker* case. The Seventh Circuit, in attempting to bridge this gap, devised the term "continuing relationship" (at page 1200) for the language "conduct which constituted a continuing violation" used in the *Hanover Shoe* case. However, a "continuing relationship" is not synonymous with a "continuing violation" unless it is predicated on monopolistic duress, i.e., unless the collection of rents or installment payments is the exercise of monopoly power, an element which is lacking in the *Baker* case. From the foregoing, it can readily be seen that the Seventh Circuit's reliance on the *Zenith* and *Hanover Shoe* cases as authorities for its conclusion is patently unsupportable.

The Petitioners, therefore, respectfully submit that there is a direct conflict among the various Circuit

Courts on the interpretation to be placed upon 15 U.S.C. Sec. 15b sufficient to invoke the discretionary jurisdiction of this Court.

### III. CONTRARY TO RESPONDENTS' CONTENTION, THE COURT BELOW HAS INDEED DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT ONLY PRESENT, BUT IMPORTANT FUTURE, IMPLICATIONS.

The decision of the court below directly affects two unrelated cases on the same issue in which counsel for Petitioners happens to be involved, *Edward R. Joyce* v. *Fairview Land Corporation*, FL 75-340-Civ-SMA (D.C.S.D. Fla. 1975), on appeal to the Circuit Court of Appeals for the Fifth Circuit as Case 76-3524, and *Newth Gardens, Inc.* v. *James H. Readyhough*, WPB 75-267-Civ-CF (D.C.S.D. Fla. 1975), on which an opinion on the point at issue has not yet been rendered. Both of these cases have been continued pending the decision of this Court in this case.

Of the reported cases in which others are involved, *Spitz* v. *Herbert Buchwald*, 551 F.2d 1051 (5th Cir. 1977), is on the same issue as the present case and was decided in the same way by the Circuit Court, citing their opinion in the present case.

In view of the numerous condominiums located in Florida, as well as the great number located throughout the United States, which involve the same factual situation as the present case and which were sold more than four years ago, it is far from speculative to say that a veritable flood of cases will be unleashed if the Fifth Circuit's construction of the Statute of Limitations as to when a cause of action accrues under such facts is upheld.



In fact, the Fifth Circuit's decision has opened a Pandora's box by permitting ancient matters to be litigated not only now, but in the future. Such litigation may furthermore be instituted by a person who was not even an original party to the transaction. The original party might have been satisfied with the lease. However, when the original party sold or transferred his condominium unit, the person then acquiring the condominium unit, who thereby assumed the lease, may at any time during the remaining life of the lease sue the lessor under the antitrust laws. The effect of the Fifth Circuit's decision thus is to frustrate the legislative intent of the Congress, which, by passing 15 U.S.C. Sec. 15b, specifically inserted a statute of limitations in the antitrust laws to permit the orderly and uniform demise of ancient causes of actions under the antitrust law.

Contrary to Respondents' contention in their Brief in Opposition (at page 9), the court below, as shown by our Petition (at page 18-19), has placed a new construction on an important Federal statute. If left to stand, it will set a new precedent heretofore not passed upon by this Court.

The Petitioners, therefore, respectfully submit that there is indeed an important question of Federal law involved in the present case which does affect the public.

Furthermore, equally as important is the precedent that the opinion of the court below sets in other unrelated fields. As noted by Professor Kurland of the Chicago Law School:

> "The primary function of the Supreme Court, however, must be in the third of the categories I have delineated. It must, as everyone concedes, confine its role at least to the decisions of important cases, cases that have importance for the law as a whole and not those that merely happen

to involve large sums of money, goods, services or people. These important cases are largely constitutional cases and *cases involving the construction of important federal statutes.*"[3] (emphasis supplied)

In *Baker,* the Seventh Circuit applied the same interpretation of the Statute of Limitations to the Civil Rights Act as it did to the antitrust laws. If the Second Circuit had agreed with such interpretation (which it obviously did not), it would have applied it to the contract in *Korn* v. *Merrill, supra,* involving the Investment Company Act of 1940.

## IV. RESPONDENTS ARE IN ERROR IN CONTENDING THAT THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE NEAREST APPLICABLE DECISONS OF THE SUPREME COURT.

As has been shown, the court below (and the Seventh Circuit in *Baker, supra,* upon which the court below relied) misconstrued and misapplied the legal concepts of this Court in the *Zenith* and *Hanover Shoe* cases, the leading cases on the subject.

---

[3]Kurland, *Jurisdiction of the United States Supreme Court: Time for a change?* 59 CORNELL L. REV. 616, 619 (1974)



## CONCLUSION

For the reasons stated herein and in the petition, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BRIAN C. DEUSCHLE
DONALD C. HAIN
5554 North Federal Highway
Fort Lauderdale, Florida 33308
*Attorneys for Petitioners*

*Of Counsel:*
SPEAR, DEUSCHLE & CURRAN, P.A.
September 15, 1977